

# MASSACHUSETTS Lawyers Weekly

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## Attorneys eager to see how Trump crypto revolution takes shape

*All signs point to major shift in digital asset regulation*

■ KRIS OLSON

The direction is clear. The details are not.

That was the sentiment of Massachusetts attorneys concerning President Donald J. Trump's pledge to make the United States the "crypto capital of the planet" and a "bitcoin superpower."

To be sure, there have been some tea leaves to pore over. On Jan. 23, Trump issued an executive order titled "Strengthening American Leadership in Digital Financial Technology." Its most tangible provision will lead to the creation of a "working group" on digital asset markets helmed by his special advisor for artificial intelligence and crypto.

Trump's "crypto czar," venture capitalist David Sacks, held a press conference on Feb. 4, highlighting legislation to create a "clear regulatory framework" for stablecoins — a type of cryptocurrency whose value is tied to a real-world asset like the U.S. dollar — as one priority.

Sacks added that his task force also would be exploring Trump's suggested creation of a national bitcoin reserve or digital asset stockpile.

The president and First Lady Melania Trump may have also muddied the waters by launching their own

"meme coins" — digital assets closer to collectibles than currency — on the eve of the inauguration.

Perhaps of more interest to attorneys advising cryptocurrency clients are the signals coming from the Securities and Exchange Commission. The day after Trump's inauguration, the SEC announced the launch of its own crypto task force, led by Commissioner Hester Peirce. The task force has been charged with developing a "comprehensive and clear regulatory framework for crypto assets."

Peirce posted a statement to the SEC's website on Feb. 4 titled "The Journey Begins," drawing an analogy to the way technology has improved road trips like the ones she used to take with her family from Ohio to Maine.

"The crypto road trip on which the newly announced Crypto Task Force has embarked likewise should be more enjoyable and less risky than the crypto road trip the Commission has taken the industry on for the last decade," she wrote. "On that last trip, the Commission refused to use regulatory tools at its disposal and incessantly slammed on the enforcement brakes as it lurched along a meandering route

with a destination not discernible to anyone."

That description of what it has been like to be in the "back seat" is accurate, local attorneys say. They are looking forward to a smoother ride, even if they cannot yet see around every bend.

### CHANGE LONG TIME IN MAKING

No matter who had won the 2024 presidential election, change was bound to come to federal regulation of cryptocurrency, said Boston attorney Richard F. Kerr, a leader of his firm's digital assets, blockchain technology and cryptocurrencies industry group.

"It would be hard for any administration not to be more friendly to the digital assets industry than the prior administration," he said, noting that some of the largest donors to each of Trump and Kamala Harris' campaigns also had ties to cryptocurrency.

"I think we were going to see a softening of the federal government's position with respect to digital assets, largely because I think there's a recognition that it wasn't a fad, it's not going away," Kerr added.

East Providence attorney John E. Deaton, who challenged U.S. Sen. Elizabeth Warren in November, agreed that the federal government “really did have its boot on the industry” during the Biden administration.

Deaton, who has represented holders of XRP, the third largest crypto token in the world, and customers of the crypto asset trading platform Coinbase, said he now hopes the pendulum does not swing too far in the other direction.

“I’m someone who legitimately has been fighting for smart, tailored regulations,” he said.

Waltham attorney Richard D. Cocci said his firm has worked with legitimate exchanges, data providers and different types of crypto service companies headquartered in places like the Cayman Islands and Bermuda because they do not want to deal with the regulatory uncertainty in America.

Such providers are eager to see a framework that defines “where crypto falls on the financial asset spectrum,” he said.

## SHIFT IN FOCUS

Boston attorney Gary S. Matsko said he was struck by the SEC “falling on its sword” in the early days of the second Trump administration, acknowledging that its enforcement priorities may have been off target.

“It’s kind of a stunning self-criticism when you know about what it takes for the SEC to bring a lawsuit,” he said.

That process involves the SEC’s enforcement division making a presentation to the commissioners, incorporating input from legal scholars, the general counsel’s office, and sometimes other divi-



Gary S. Matsko

sions. Prospective defendants are also told that the SEC is contemplating a lawsuit and given an opportunity to make a presentation.

“The biggest law firms in the country have weighed in on these [enforcement] theories,” Matsko said.

Now, the SEC seems to be acknowledging that the intensive process had somehow gone amiss.

“It echoes a lot of other things we hear out of the new administration about regulation and the government’s role,” Matsko said. “I think we’re going to see a retreat from cyber enforcement and cryptocurrency enforcement, whether that’s a response to the administration or whether the SEC looked back and thought, ‘We missed some steps here.’”

In recent years, some of the SEC’s biggest cases have not involved fraud. Late in 2020, it filed an action against Ripple Labs and two of its executives, alleging that they raised over \$1.3 billion through an unregistered, ongoing digital asset securities offering. In 2023, the SEC charged Coinbase Inc. with operating its crypto asset trading platform as an unregistered national securities exchange, broker and clearing agency.

But Boston attorney Eric S. Rosen, a former state and federal prosecutor who specializes in cryptocurrency cases, said he expects time-consuming litigation under Section 5 of the Securities Act of 1933 to recede.

“I think that’s going to be a major sea change,” Rosen said. “The cryp-

to industry has probably won that fight for at least the interim.”

However, Rosen said he expected the SEC pursuit of fraudsters like Samuel Bankman-Fried, CEO and co-founder of the crypto trading platform FTX Trading Ltd., to continue unabated.

“I don’t think that there’s going to be a ton of change regarding fraud cases,” he said. “I think the SEC will certainly continue down that path, as will federal prosecutors in the DOJ.”

Kerr said he would also be interested in knowing whether the SEC intends to continue to pursue litigation and enforcement actions it initiated in the second half of 2024.

## WHAT ‘REGULATORY CLARITY’ LOOKS LIKE

The digital assets industry has been clamoring for “regulatory clarity” for several years, Kerr noted.

“What we’ve seen is the [former] chairman, [Gary] Gensler, and the rest of the SEC and others saying, ‘There is regulatory clarity; it’s called the 1940 Act, the Securities Act of 1933, the Advisors Act and the Exchange Act, and all the rules under all of them,’” Kerr said. “If you can’t live within the confines of those rules, then you’re out of luck.”

But that did not answer all the industry’s questions, Kerr said. Instead, it wanted a roadmap of how to interpret the rules.

“The SEC, for better or for worse, had taken a position during the last four years that they weren’t going to issue informal guidance of that sort,” Kerr said.

One of the first things that he would expect to see are guidance statements that clarify issues such as how the test that the U.S. Su-

preme Court established in the 1946 case *Securities and Exchange Commission v. W.J. Howey Co.* should be applied in the digital assets context, Kerr said.

“We have the SEC’s framework from a handful of years ago, but depending on who you talk to, that framework either results in everything being a security or everything not being a security,” Kerr said.

A similar effort could be overseen by the Commodity Futures Trading Commission to determine what is and is not a commodity, he added.

Beyond that, one of the ideas Kerr said he has heard floated in industry circles is that, to the extent there are firms who have gotten on the wrong side of the rules because they were unclear as to how to apply them, there should be a “path back to respectability” that does not subject them to penalties or being identified as bad actors.

“There’s a thought that perhaps there could be some sort of a self-reporting regime where penalties would be minimized,” he said.

Such a regime might be followed by a “lighter” form of registration, Kerr added.

“The types of things that I think the working group will be thinking about is, ‘How do we level set to where our companies that want to play nice in the sandbox are invited back into the sandbox and not marginalized in the way they were over the last handful of years?’”

In terms of consumer protection, Deaton would like to see exchanges required to have “100 percent reserves,” which would prohibit exchanges from co-mingling funds and allow customers to withdraw everything in the accounts at any time.

Currently, if you are a Coinbase customer with \$1,000 in your account, that would be considered an asset of Coinbase if it filed bankruptcy, Deaton noted. Just such a scenario played out in the FTX case.

Deaton and Rosen said one thing they would like to see emerge in the forthcoming regulatory framework for the cryptocurrency industry is a consolidation of the agencies involved in enforcement. Currently, cryptocurrency companies might face scrutiny from the Department of Justice on the criminal side and SEC and CFTC on the civil side. But agencies such as the Office of the Comptroller of the Currency and banking regulators are also part of the picture.

“I’ve been in cases where there are three agencies [on the other side],” Rosen said. “I can’t say it adds a ton of value to have it done that way.”

Except for certain types of tokens, Deaton believes it should be the CFTC that takes the lead in civil matters related to cryptocurrency.

One agency likely to have a lesser and perhaps even nonexistent role in regulating cryptocurrency moving forward is the Consumer Finance Protection Bureau. On Feb. 1, the Trump administration fired the bureau’s director, Rohit Chopra, and installed Treasury Secretary Scott Bessent as its acting director.

Bessent’s first act in that role was to order CFPB staff immediately to halt much of the bureau’s work, and its future direction is unclear.

Chopra “talked a big game” in terms of introducing consumer protection into the cryptocurrency realm, which Rosen said he would have welcomed.

“Big crypto” has long argued that no law applied to it, “which can’t be the case,” Rosen said.

A positive step toward providing guardrails for crypto would have been to expand provisions under the Electronic Fund Transfer Act, which the CFPB is charged with implementing, he said.

The CFPB had been poised to make such rules but never got around to it, Rosen noted.

“Now, they won’t get around to it,” he said. “I think that ship has sailed.”

## **OPEN THOSE WALLETS**

In an ideal world, the Trump family would have remained bystanders rather than active participants in an industry the new administration will be regulating, attorneys say. But that has hardly been the case.

In less than two weeks, entities that include CIC Digital, a company owned by Trump himself, have accumulated close to \$100 million in trading fees from the president’s crypto coin, Reuters reported.

“It raises questions of propping up an industry that he’s heavily invested in and now has regulatory control over through the SEC,” Cocci said. “It definitely paints a clear conflict of interest.”

Deaton noted that the president’s son, Eric, also appeared to have helped fuel a rally in the value of the world’s second most popular blockchain, Ethereum, by posting favorably about it on X on Feb. 3.

Deaton said the public is entitled to more transparency into the digital wallets of the first family to ensure that they are not engaging in any sort of “pump and dump” scheme.